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December 21, 2021

Hon. James B. Cox
President, Tennessee Judicial Conference
112 Main Avenue South
P.O. Box 713
Fayetteville, TN 37334

Re: Tennessee Pattern Jury Instructions

Dear Chancellor Cox:

We write as counsel for Public.Resource.Org (“Public Resource”), a 501(c)(3) non-profit corporation based in California. The mission of Public Resource is to enhance public access to government information and public law. As you may be aware, Public Resource has made significant strides in pursuit of this mission, including a recent victory at the United States Supreme Court regarding public access to annotated state codes. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020). That case makes clear that edicts of government cannot be copyrighted by states and that there is a strong public interest in broad access to such edicts.

We write specifically to urge the State of Tennessee to remove barriers to access that the State has impermissibly put in place with respect to the Tennessee Pattern Jury Instructions — Criminal and Civil (the “TPI”), developed and promulgated by Tennessee Judicial Conference’s Committee on Pattern Jury Instructions (the “Committee”). At present, the TPI can only be accessed by paying a \$1,087 fee per volume to a commercial publisher. Even for those non-lawyer citizens that can afford the TPI, these materials are not easily accessible to the visually impaired and are hard to find and navigate.

Overview and Background

Our client has made the TPI, and model jury instructions from eighteen other states, publicly available and digitally accessible on the non-profit Internet Archive (<https://archive.org>) at the following location:

<https://archive.org/details/JuryInstructions>

The collection offered by Public Resource has several features that make the edicts of government contained therein more useful. Books containing model jury instructions are

scanned and then undergo several operations, such as Optical Character Recognition or “OCR,” to convert typed text into machine-coded text. Public Resource uses custom open-source software code to create modern HTML files, making the materials more usable for the visually impaired. In the “subject and topics” pane accessible in the collection, a user may click on a particular state name to find materials for that jurisdiction. There is also the capability to search inside the texts across the entire collection, allowing a user to enter a search term such as “eviction”:

<https://archive.org/details/JuryInstructions?query=eviction&sin=TXT>

The search identifies any volumes containing that search term. When the user clicks on a volume, it will open to the relevant page that contains the term; “pins” below the book identify other pages that have that word or phrase.

Public Resource is working with legal informatics clinics to make the collection even more usable, using big data and machine learning technologies to identify similar jury instructions in different states. By allowing such research efforts, our client expects to see even more improvements in accessibility and usability of the instructions. All of these materials are easily found on the world wide web using search engines such as Google or Bing.

The Tennessee Pattern Jury Instructions

The TPI is an invaluable tool of democracy in the State of Tennessee. In making the TPI accessible to the broader public, Public Resource hopes to facilitate widespread participation in the Tennessee legal system. The jury is a key component of a fair and accessible judicial system in the United States. The widescale availability of the Tennessee Pattern Jury Instructions, therefore, contributes to fair and accessible justice in the State of Tennessee. The TPI constitutes the best plain-language statement of the law as concerns charging of juries in civil cases in the State.

The preface to the TPI notes that jury instructions “are of overriding importance to the trial judge.” The benefit provided by the TPI to the Tennessee judicial system is immeasurable, and its value to the public cannot be overstated. This value can only be fully realized through greater accessibility.

Although litigants are not required by law to use the TPI in Tennessee, trial courts “frequently use them as a source for jury instructions.” *State v. Davis*, 266 S.W.3d 896, 901 (Tenn. 2008) This widespread use and encouragement is well-justified, given the quality of the TPI. Its integration into the Tennessee judicial system is natural. As a result, its goals can only be accomplished through widespread availability to the public.

Edicts of Government Doctrine

As you are no doubt aware, because the TPI was issued in the name of the Tennessee Judicial Conference and created by judges in the course of their judicial duties, it is not eligible for copyright. The American legal system operates on the assumption that every citizen knows the law. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020). Thus, it follows that all citizens should have free access to the contents of the law. *Id.* The U.S. Supreme Court has given effect to this principle through the articulation of the government edicts doctrine. *Id.*

The Copyright Act grants monopoly protection for “original works of authorship.” 17 U.S.C. § 102(a). Effectively, this means that, to be copyrightable, a work must have a copyright-eligible author. Under the government edicts doctrine, officials empowered to speak with the force of law are not copyright-eligible authors of the works they create in the course of their official duties. *Georgia*, 140 S. Ct. at 1501. Thus, such government work product is excluded from copyright protection. *Id.* at 1504.

The government edicts doctrine, as it exists today, emerged from a trio of Supreme Court cases decided in the 19th century. *See Wheaton v. Peters*, 33 U.S. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888).

These three cases established a straightforward rule: because judges are empowered to speak with the force of law, they cannot be the authors of the works they create in the course of their official duties for the purposes of obtaining copyright. *Georgia*, 140 S. Ct. at 1507. In our client’s recent case against the State of Georgia, the United States Supreme Court extended the application of the government edicts doctrine to include works created by legislators acting in their role as legislators. *Id.* at 1505.

In the 2020 *Georgia* decision, the Court clarified that the relevance of the government edicts doctrine to a particular work rests on the identity of the author rather than whether the work carries the force of law. *Id.* at 1506. Thus, it is not required to determine which materials constitute “the law,” because the doctrine bars officials responsible for creating the law from being considered authors for copyright purposes of *any work* created in their lawmaking capacity. *Id.* In effect, this means that the doctrine applies not only to final legislation but also to explanatory and procedural materials that legislators create in their official duties (including but not limited to model jury instructions). *See id.* at 1508.

Under Supreme Court precedent, then, copyright protection cannot exist in works that, like the TPI, are (1) created by judges and legislators (2) in the course of their judicial and legislative duties. *Id.*

The Committee

The TPI was created by judges in the course of their judicial duties. Therefore, it falls under the above framework and is ineligible for copyright protection.

Furthering comprehension of the judicial system is a necessary function of judgeship. In the creation of the TPI, Tennessee judges drew upon their professional experience to fulfill a professional duty.

The TPI lays out how, in 1970, the president of the Tennessee Judicial Conference established the Committee on Pattern Jury Instructions. This Committee was headed and composed of judges. Just eight years later, the first edition of the TPI was published.

In the following years, several Justices joined the Committee or served as advisors, replacing judges that left the Committee, retired, or passed away. Although innumerable people contributed in part to the TPI, the core of the Committee has always been Justices. At the time of publishing of the 21st edition of the TPI – Civil, the thirty-three-person Committee included thirty-one judges.

A main purpose of the Committee is to help guide trial judges in instructing juries clearly. The authors' dedication to this purpose is indistinct from their judicial duties. Upon entering office, judges swear an oath to administer justice, a core part of which is facilitating participation in the judicial system. The TPI is relevant and highly useful to this goal. Additionally, the creators' experience as judges was a necessary part of their authorship. This experience gives the TPI the authoritative weight it holds today.

For these reasons, the TPI was created as part of its authors' judicial duties. It is therefore ineligible for copyright protection.

Conclusion

The commitment shown by those involved in creating the TPI is a testament to their devotion to the law and public service. The intentions of those involved in the work would be best served through offering public access to these instructions, so that all may benefit from the knowledge that they have thoughtfully shared.

Particularly at a time when our nation's legal system has come under substantial scrutiny from all sides, a commitment to transparency and openness in the law is crucial to restoring public confidence. Those in the legal system should strive to eliminate barriers to information that should be widely available. Removing the claims of copyright protection on the TPI would be an invaluable step in this direction.

We hope you will agree that the entire public should be able to enjoy the benefits of the TPI. Currently, the TPI provides an inaccurate copyright notice that purports to vest ownership in the Tennessee Judicial Conference. For the reasons explained, the TPI is not eligible for copyright protection. Therefore, we ask that you:

1. abandon and withdraw all copyright claims from the TPI; and
2. support efforts to provide public access to these important edicts of government.

Along with Public Resource, we would be more than happy to discuss this with you or your staff. Thank you for your time and attention.

Respectfully submitted,



Christopher T. Bavitz

cc: Hon. Jeffrey S. Bivins
Chief Justice, Tennessee Supreme Court

Carl Malamud
President, Public Resource

David Halperin
Of Counsel, Public Resource